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In the Supreme Court of the United States

OCTOBER TERM, 1962.

No. 76.

JAMES GALLICK,

Petitioner,

vs.

THE BALTIMORE AND OHIO RAILROAD CO.,

Respondent.

ON WRIT OF CERTIORARI
TO THE COURT OF APPEALS, CUYAHOGA COUNTY, OHIO,
EIGHTH JUDICIAL DISTRICT OF OHIO.

BRIEF OF PETITIONER.

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BRIEF OF PETITIONER.

OPINIONS BY COURTS BELOW.

The Court of Appeals for Cuyahoga County, Ohio, Eighth Judicial District of Ohio, in Cases Nos. 25017 and 25087 consolidated, entitled *James Gallick v. The Baltimore and Ohio Railroad Co.*, rendered its judgment and decision reversing the judgment of the trial court in favor of Petitioner upon the special verdict of the jury. The opinion of the Court of Appeals dated March 23, 1961, is reported in 86 Oh. L. Abs. 1, 176 N. E. 2d 382 (1961), (R. 618-628). The judgment journal entry of the Court of Appeals dated April 11, 1961 is found on pages 629 and 630 of the Record. The judgment of the Court of Appeals reversed a judgment in favor of the petitioner herein which had been entered in his favor in the sum of Six Hundred

Twenty-five Thousand Dollars ($625,000.00) upon the special verdict of the jury by the Court of Common Pleas of Cuyahoga County, Ohio. The journal entry of judgment in favor of petitioner by the Court of Common Pleas of Cuyahoga County, which incorporates as part of said journal entry the special verdict of the jury, is on pages 6 through 14 of the the Record. The judgment of the Court of Appeals which reversed the judgment of the Court of Common Pleas in favor of petitioner, and instead entered final judgment for respondent, was bottomed on the single proposition that petitioner's proofs of causal connection fell short of the degree of proof on that issue required by law, hence the trial court erred in not directing a verdict at the conclusion of all of the evidence in favor of respondent, or in the alternative in not entering judgment for respondent notwithstanding the verdict of the jury. (R. 629 shows the two grounds of judgment of the Court of Appeals.) *It is important to here note that the Court of Appeals in its journal entry did not find error in the refusal of the trial court to enter judgment for Respondent upon the special verdict and in overruling Respondent's motion for same, thereby specifically rejecting one of respondent's principal contentions i.e. that the special verdict of the jury as a matter of law entitled respondent to judgment.* (R. 14.) See *Assignment of Error No. 11* (R. 621).

Petitioner thereupon sought a review of the cause by means of a motion to the Supreme Court of Ohio to direct the Court of Appeals to certify its record to the Supreme Court of Ohio for review, and also seeking a review on Constitutional questions under the Constitution of the State of Ohio and of the United States pertaining to the right of petitioner to a trial by jury in an action brought under the Federal Employers' Liability Act. (R. 631) (R.

637-638.) The jurisdiction of the Supreme Court of Ohio to review the case is found under Article IV, Section 2, Constitution of the State of Ohio. Under these provisions of the Constitution of the State of Ohio, petitioner had no appeal as a matter of right to the Ohio Supreme Court. Review by that Court is discretionary upon the ground that the case is one "Of public or great general interest," or "that a debatable constitutional question is involved." The review sought by petitioner raising questions of public or great general interest and constitutional questions was denied by the Ohio Supreme Court. (R. 639.) At the same time, respondent likewise sought a review by the Ohio Supreme Court of the judgment of the Court of Appeals for Cuyahoga County by means of a cross-motion to certify, likewise claiming questions of public or great general interest. (R. 633.) The Supreme Court of Ohio, however, refused to take jurisdiction of the cause and issued orders overruling the motion to certify of petitioner, the cross-motion to certify of respondent, and determined that no debatable constitutional question was presented by the judgment of the Court of Appeals. (R. 639 *et seq.*) Respondent thereupon filed a motion for a re-hearing on its cross-motion to certify, which motion was denied. (R. 642.) Thus, all remedies available through the state judicial system of the State of Ohio have been exhausted by petitioner.

Under the Law of Ohio, therefore, the judgment of the Court of Appeals for Cuyahoga County, Ohio, Eighth Judicial District of Ohio, became the final judgment of the highest court of the State of Ohio in which a decision could be had. *Cuyahoga River Power Co. v. Northern Realty Co.*, 244 U. S. 300, 37 S. Ct. 653 (1917).

JURISDICTION OF THIS COURT.

Jurisdiction of this Court to review the said judgment of the Court of Appeals for Cuyahoga County and to review the constitutional questions raised by petitioner are conferred upon this Court by the Act of June 25, 1948, c. 646, 62 Stat., 929, Title 28, U. S. C. Section 1257. The portions of that section pertinent to jurisdiction of this review provide as follows:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (3) By writ of certiorari * * * where any title, right, privilege or immunity is specially set up or claimed under the Constitution * * * or statutes * * * of the United States."

In this case petitioner specially set up and claimed a right under a statute of the United States, namely, the Federal Employers' Liability Act, 35 Stat. 65, 36 Stat. 291, 53 Stat. 1404, 45 U. S. C., Secs. 51-60, and Amendments thereto. (R. 1-4.) Petitioner asserts that the judgment of the Court of Appeals of Ohio under this Federal statute is not in accord with applicable decisions of this Court.

The orders of the Supreme Court of Ohio which overruled petitioner's motion to Certify the Record and review the judgment of the Court of Appeals were entered less than ninety days from the filing of the Petition for writ of certiorari, which Petition was duly filed in accordance with the Act of Congress of June 25, 1948, c. 646, 62 Stat. 961, amended May 24, 1949, c. 139, Sec. 106, 63 Stat. 104, 28 U. S. C., Sec. 2101 (c). Certiorari was duly granted by this Court (R. 643).

QUESTIONS PRESENTED FOR REVIEW.

1. In this action under the Federal Employers' Liability Act was the Court of Appeals correct in holding that the proofs of petitioner on the issue of causal connection failed to rise above the level of "speculation and conjecture" when tested by the quantum of proof prescribed by this Court to justify submission of the cause to the jury?

2. By its order of judgment directing a verdict for respondent for the sole reason that the proofs of petitioner on the issue of causal connection failed to rise above the level of "speculation and conjecture," did the Court of Appeals thereupon deny petitioner his constitutional guarantee of trial by jury under the Federal Employers' Liability Act. 45 U. S. C. A., 51?

3. Was the invocation of jurisdictional power by the Court of Appeals to weigh the evidence and thereupon substitute its finding for that of the jury on the issue of legal causation an unlawful exercise by the Court of Appeals of jurisdictional power under the doctrines of appellate review pronounced by this Court in actions brought under the Federal Employers' Liability Act, 45 U. S. C. A., 51?

4. Where an examination of the Record of testimony in its entirety discloses circumstantial evidence from which the jury could infer the necessary legal causation between respondent's negligence and petitioner's injury, may the Court of Appeals determine as a matter of law that such evidence is not "proof," but merely "speculation and conjecture," and thereby enter judgment for the respondent as a matter of law after the jury had found causal connection in the special verdict and judgment upon the verdict of the jury had been entered for petitioner?

5. In this action under the Federal Employers' Liability Act, was the Court of Appeals correct in applying as a legal standard to determine legal causation, proof of an "efficient" cause?

6. In this action under the Federal Employers' Liability Act, where petitioner adduced proof that his injuries were the result of an insect bite from an insect which could have come from the unsanitary pool of water complained of, was petitioner required to adduce proof that the insect did not come from other sources for which respondent was not liable?

7. In this action under the Federal Employers' Liability Act, were the special findings by the jury of negligence and causal connection supported by credible evidence when correctly tested by principles governing judicial review set forth by this Court?

8. In this action under the Federal Employers' Liability Act, where the jury, in response to specific inquiries submitted to it as a special verdict, found particular acts and omissions of the respondent which in the opinion of the jury constituted negligence, and the jury found a proximate causal relationship between the conditions constituting negligence and the injury to the petitioner, may the reviewing Court of Appeals thereupon set aside a judgment in favor of petitioner entered upon said special verdict for alleged insufficiency of evidence where there is credible evidence in the record to support the findings of the jury?

9. Where the Court of Appeals in its Opinion concedes that "*by overwhelming testimony*" the pool of stagnant, vermin-infested water, alongside the tracks of respondent for many years prior to the bite suffered by petitioner contained insects in and about said stagnant pool,

and that insects of the size described by the injured petitioner might infest said pool and bite a man, and that petitioner did in fact suffer a bite on respondent's premises by some insect in the course and scope of employment, and "from such bite severe consequences to Mr. Gallick have ensued," may the Court of Appeals thereupon, under the principles of judicial review pronounced by this Court, find prejudicial error to the rights of respondent in submitting said cause to the consideration of the jury on the sole ground that whether the insect causing the damage had any connection with the pool of stagnant water on respondent's premises, or whether it came from other sources on property not owned or controlled by respondent, presented only a series of "guesses and speculations" making a chain of causation "too tenuous" to support a conclusion of liability on the part of respondent?

STATUTES INVOLVED.

45 U. S. C. Sec. 51, Appendix A
45 U. S. C. Sec. 53, Appendix B
45 U. S. C. Sec. 54, Appendix C
45 U. S. C. Sec. 56, Appendix D
Ohio Revised Code Sec. 2315.15, Appendix E
Ohio Revised Code Sec. 2315.16, Appendix F
Ohio Revised Code Sec. 2315.17, Appendix G

STATEMENT OF THE CASE.

Petitioner, plaintiff below, filed an action against respondent railroad, defendant below, in the Court of Common Pleas of Cuyahoga County, Ohio. The petition after the necessary allegations to invoke the applicability of the Federal Employers' Liability Act, alleged negligence in that defendant knew that by permitting a pool of stagnant water on its premises at Lime Road and the Columbus

Road Bridge in Cleveland, Ohio, to accumulate dead pigeons, rats, bugs and vermin, insects would be attracted to said area, and that its employees would have to work under unhealthful and unsanitary conditions. (R. 2-3, Spec. of Neg. 6.) Plaintiff further alleged that by reason of such negligence and as a direct and proximate result thereof, he was caused to be bitten by an insect while working in and about said pool of stagnant water in the performance of his employment duties which caused his system to become poisoned and which resulted in the formation of deep, acute ulcerations with draining about his extremities and body, which injuries have necessitated surgery for the amputation of both of his legs, that he is confined to his hospital bed and a wheelchair, and will remain so into the indefinite future. Plaintiff alleged other injuries and permanent incapacity from earning wages, for all of which he prayed as damages the sum of Seven Hundred Fifty Thousand Dollars ($750,000.00). (R. 3-4.)

Defendant, by its answer, admitted that plaintiff's duties for respondent as a yard foreman and yard helper were in furtherance of interstate commerce and that the work duties of petitioner, during the time alleged, specifically the month of August, 1954, caused him to be present from time to time at or near tracks of respondent located in the vicinity of Lime Road and the Columbus Road Bridge. (R. 4-5.) Respondent thereupon pled in its answer to the amended petition certain affirmative defenses which were denied by a reply. (R. 5-6.)

As already indicated, the trial court submitted certain specific issues to the jury as alleged determinative issues under the special verdict statute of the State of Ohio, Ohio Revised Code, Section 2315.15. Upon consideration of the jury's answers to said determinative issues, the trial court thereupon entered judgment in favor of petitioner.

(R. 6-14.) Subsequently, various motions of respondent for judgment on the special verdict, a new trial, or judgment in its favor notwithstanding the verdict of the jury, were overruled by the trial court. (R. 14-15.)

It is important to note that the Court of Appeals in its review of the cause specifically found no error under the laws of the State of Ohio in the admission or exclusion of evidence; the charges of law submitted to the jury; the form of the special verdict or the answers of the jury thereto; the size of the verdict or judgment; or that the special verdict of the jury did not contain findings sufficient to support a judgment for petitioner. See for example the 16 grounds of alleged error prosecuted by Respondent to the Court of Appeals (R. 621, 622) and the statement of the Court of Appeals, "All other claimed errors have been examined, and we find none prejudicial to the rights of the appellant." (R. 628.) *It is crystal clear from the Opinion of the Court of Appeals that if that Court erred in its conclusion that under the law the evidence was insufficient to warrant submission of the cause to the jury in the first place, then in all other respects the judgment in favor of petitioner was proper.* The various procedural claims of error under Ohio Law asserted by respondent were specifically rejected by the Court of Appeals and by the Supreme Court of Ohio in its refusal to take jurisdiction on the cross-motion to certify of respondent and denial of the motion for rehearing of respondent. (R. 636, R. 640-641.) *Thus, the single issue presented is whether the proofs justify with reason the finding by the jury that respondent's negligence played some part in producing petitioner's injuries.* The Court of Appeals held as a matter of law that the proofs did not. This is the fundamental error which forms the basis for the instant appeal on writ of certiorari.

STATEMENT OF FACTS AND EVIDENCE.

In brief, by way of background, it may be stated that in August of 1954, while performing his usual duties as a member of a switching crew, petitioner had occasion to walk in a northerly direction under the Columbus Road Bridge in the "Flats" of Cleveland on the west side of respondent's River Track. (R. 64-65.) This switching job was known as "the downtown job" or "the Seneca street job." (R. 56.) The River Track was a single track running in part under this bridge. (R. 59.) Respondent's right of way included the area on both sides of this track under the bridge. (R. 570 Exhibit 12.) He stopped underneath said bridge for a period of approximately thirty to forty-five seconds to see whether his diesel switch engine was following him up the track. (R. 65) (R. 93.) Upon ascertaining that it was so doing, he took one or two steps again to the north at which time he felt the "bite" of an insect on the back of his left leg just above the knee. (R. 66.) Note special finding of the jury, Exhibit X (R. 14). Upon feeling the bite he squeezed this area of his leg and felt a crack or pop. Something then rolled down his pants leg about two inches long and half inch in diameter. (R. 66.) The Court of Appeals from its review of the testimony entertained no doubt that Petitioner was bitten by an insect on railroad property. The opinion states:

> "We have sufficient credible evidence to conclude, *as did the jury*, that Mr. Gallick suffered a 'bite' on railroad property by some insect while working for that railroad." (Emphasis added.) (R. 626.)

Opposite to where petitioner was standing, on the east side of said track, was a pool of stagnant water which contained quantities of dead pigeons, dead rats, and sundry varieties of crawling and flying bugs, lice and vermin. (R.

59-60.) The stagnant pool underneath the bridge was within respondent's right of way under its possession and control. (R. 282.)

William Molnar, a brakeman of fourteen years service with the respondent, who had worked in this area on and off for several years (R. 17), described the area as a swamp with dead pigeons, rats and insects as long as he could remember.

> "Q. Is it not a fact, Mr. Molnar, that when those rats and pigeons, the dead rats and pigeons, were lying in that ditch, there were bugs and insects around them, is that not a fact, sir?
>
> A. There is always bugs where the stagnant water was.
>
> Q. Were they there when the rats were there and the dead pigeons were there, Mr. Molnar, is that not a fact?
>
> A. Yes." (R. 23.)

Walter Rady, a brakeman employed by the defendant for thirty-nine years during which he worked this area on Saturday and Sunday as a relief man (R. 27) described these conditions substantially the same as Molnar. (R. 28-29.)

William Clason, a yard foreman of fourteen years service (R. 31), who had walked under the Columbus Road Bridge many times during his work (R. 32), corroborated these conditions and further the inadequate maintenance efforts of respondent section crew as follows:

> "Q. Is it not a fact that Paul Delaria, the section foreman, had made several attempts to clear this swamp up but was never successful?
>
> A. Yes, he did work on it to drain it.
>
> Q. Sir, please. Read the question. You can answer that, if I have stated a fact to you you say yes, and if I haven't stated a fact you say no.

A. Yes.

Q. Is this not a fact, that the condition was bad several years ago, and was still bad in August of '54, sir?

A. Yes." (R. 33.)

Petitioner himself had ten years of experience with respondent as a brakeman or yard foreman (R. 54, 93). He described the conditions underneath the bridge as follows:

"Q. Jim, can you describe the condition underneath the bridge, particularly along the east rail as it was in August of 1954?

A. *Well, there was stagnant water, dead rats, pigeons, with insects flying above and in the water.*

Q. *Were those rats and pigeons in the water?*

A. *In the water and along the rail.*

Q. How long, if you know, had that condition which you now describe existed before August of 1954?

A. As long as I remember.

Q. Well, how long do you remember, Jim?

A. Well, the length of time that I worked for the B & O Railroad, 10 years.

Q. Was it ever cleaned up?

A. I have never seen it cleaned up.

Q. Have you ever complained about it to any one?

A. Yes, to Paul Delaria, the track foreman.

Q. To Paul Delaria, and he is what?

A. He is the track foreman.

Q. Had you complained about that before August of 1954?

A. Yes, a long time before.

Q. Had you complained about it once or more than once?

A. More than once." (Emphasis added.) (R. 59-60.)

It is clear from the testimony of respondent's section foreman, Paul Delaria, that the river track underneath the Columbus Road Bridge, and the drainage of accumulated water from the swamp area underneath the bridge on the east side of the track to a manhole south of the bridge and also east of the track, was under his jurisdiction for maintenance (R. 282, 299). This area is depicted by Exhibit 12, the blueprint prepared by Cyril W. Neff, the Civil Engineering expert called by petitioner. (R. 570.) Although the Columbus Road Bridge itself is a public bridge, the all-important fact is *that control of the drainage underneath the bridge was exclusively under the jurisdiction of respondent's maintenance crew headed by Mr. Delaria.*

The measurements of Cyril W. Neff were the only testimony in the entire case purporting to show grade elevations of the area in question. The entire problem with regard to drainage of the swamp area is summarized by Mr. Neff as follows:

> "Q. Mr. Neff, I pointed to the area underneath the bridge, that swamp area we are talking about. Is that lower than the pipe or higher, sir?
>
> A. That area is lower than the pipe.
>
> Q. And is that why it will not flow into the pipe, sir?
>
> A. That is one of the reasons why it won't flow into the pipe.
>
> Q. And could that be eliminated by the filling in of slag that you told us about?
>
> A. Yes, sir." (R. 142.)

Respondent did not produce any comparable expert to dispute Neff's testimony that five men in one day could eliminate the swamp and construct a slag fill to provide proper drainage (R. 127, R. 128). Respondent had engi-

neering experts familiar with the drainage problems under this bridge but did not produce them as witnesses (R. 301).

From the foregoing evidence the jury was certainly justified in finding that on premises under the control of respondent there existed a pool of stagnant water into which were accumulated dead pigeons, dead rats, vermin and bugs. Petitioner was required to perform his work duties in close proximity to said area. (R. 64, 67.)

With regard to the unhealthful or unsanitary nature of the foregoing conditions, there is the testimony of Dr. Ippolito as follows:

> "This man was working near a rat-infested pool, with dead rodents in it, and bugs flying in the air. The man was bitten by an insect, and the conditions that followed thereafter. I don't know how I could assume anything else, that the causative agent was this insect bite." (R. 219.)

Dr. Ippolito, gave as his professional opinion that some bacteria was introduced into this man's body at the time of the bite (R. 219; R. 220), and further testified as follows:

> "I get it from the history of the patient. The patient told me that he was bitten by an organism, by an insect, *and we do know that stagnant pools of water, particularly that are infected and have rodents, rats, in them, that insects will go to that area more so than in a dry, clean area.*" (Emphasis added.) (R. 222.)

Further testimony with regard to the unsanitary and unhealthful nature of this work area is contained in a portion of the cross examination of Dr. Robin Anderson, who testified as follows:

> "From this point we have our own history in terms of the record. We must carry our basic reasoning back one step further, *and that is that the presence of filth,*

of rats, of dead vermin, of stagnant water, predisposes to disease, predisposes to the growth of insects and the like."

"This man was bitten in close proximity to such an area of stagnant filth, and it is only logical *and we must assume that the probability is there that whatever it was in the insect, in the bug, is related to the presence of that area."* (Emphasis added.) (R. 261.)

Further, Dr. Anderson testified as follows:

"I can say in terms of medical specialized knowledge, a medical, *a doctor is expected to understand principles of sanitation, and as such we know that the presence of stagnant water is traditionally a breeder of water insects, and we know that the presence of rats implies the presence—or of various insects that feed on it*, such as plague-carrying insects which is the rat flea which lives on the rat both living and dead, and it is the cause of the famous plague episodes in history. We know a certain number of facts which are specialized perhaps in the medical sense but not specialized for an entomologist or an insect expert." (Emphasis added.) (R. 263.)

The Court of Appeals conceded that the evidence supported Petitioner's claim that the cause of his misfortune was the insect bite.

"We have an *abundance* of testimony that from such 'bite' severe consequences to Mr. Gallick have ensued." (Emphasis added.) (R. 626.)

As already noted, the incident occurred after petitioner had been standing for thirty to forty-five seconds a track width opposite the cesspool which contained the filthy conditions already referred to in the performance of his work duties. He then turned around and took a step or two to the north when he felt this bite and cracked or popped what had the feel of an insect. (R. 66.)

Thus, petitioner testified that he felt pain which was severe in the beginning and that when he climbed on the footboard of the diesel, he showed it to one of his fellow crew members. (R. 67.) When he finished his tour of duty, he had a sensation above the knee on the back of his thigh and washed the area at his locker with soap, a washrag and water (R. 67). When he arrived home at 11:00 o'clock P. M., he was still conscious of the sensation and had his wife look at the welt (R. 68). The area never cleared up and after four or five days, formed a boil (R. 69). The boil burst in the bathtub following which he went to his family doctor, Dr. Heller (R. 69, 70). The Marymount Hospital records introduced into evidence and other testimony prove that from this original site the first ulceration developed (R. 572, R. 583) (R. 385), (note especially R. 581). This was, of course, corroborated by the petitioner himself in a statement to Respondent's claim agent given in the hospital without benefit of counsel. (R. 612, R. 613.)

Mary Gallick, the wife of petitioner, testified that on the night in question, she saw a welt just like when you get a bite, which was pink in color and about the size of her nail. (R. 37.) The following morning, it got deeper in color, a deeper pink (R. 37). By the fifth day it was larger and real pink and began to raise (R. 38). By the time petitioner went to Dr. Ippolito, the area in question was described by Mrs. Gallick as follows:

> "By that time it was about the size of a half a dollar and it had raised and it had been draining on the side, and it looked very ugly." (R. 39.)

Without further encumbering this brief with factual recitations, it is undisputed that when this original lesion failed to heal with conservative treatment, petitioner was hospitalized at Marymount Hospital where-

upon a skin graft was instituted and it was only following the initial skin graft that the skin surfaces on both legs began to break down and form ulcerations which thereupon spread to other parts of his body. During this entire period of time, petitioner was under constant surveillance by trained medical technicians and physicians with daily progress notes recording his confinement at Marymount Hospital and the Cleveland Clinic. *It is significant to note that the final diagnosis of the Marymount Hospital, recorded after almost two years of continuous hospitalization, was "pyodermagangrenosa, secondary to insect bite."* (R. 577.)

Respondent's own medical expert, Dr. Davis, testified as follows:

> "Q. *Doctor, is a bite or sting from a bug a trauma?*
> A. *Yes.*
> Q. What is the meaning of the word trauma?
> A. I believe it means an injury.
> Q. What is the meaning of the term local trauma?
> A. Local trauma means that it happened in a locality of the body rather than to the whole body.
> Q. An isolated area.
> A. Isolated area.
> Q. *Is pyoderma used sometimes instead of pyoderma-gangrenosa?*
> A. *Yes, it can be. They do not mean quite the same but they are used together.*
> Q. *Do you have an opinion as to whether pyoderma can be caused by trauma?*
> A. *Yes, I think it can.*
> Q. *Is it one of the recognized causes of pyodermagangrenosa?*
> A. *Well, yes, I think it is fair to say it would be a recognized cause."* (Emphasis added.) (R. 426.)

It must be emphasized from the foregoing that it was only in the area in and about the Columbus Road Bridge,

particularly where the pool of stagnant water was maintained, that insects of the approximate size and character which bit petitioner were observed (R. 157). *No witness testified to having observed similar insects in any other area, but petitioner did testify as to observing insects that looked like this one felt "on these dead hides."* (R. 157.) We believe that this evidence as herein set forth, under the law, as will be analyzed hereinafter, entitled the jury to make the inference which it did as to a causal connection between the stagnant pool of water, the bugs, the bite which plaintiff sustained and his illness. (Exhibit U, R. 13.) In this connection again it must be emphasized that both of his treating physicians who testified, i.e., Doctors Ippolito and Anderson, surgeons of unquestioned reputation and qualification, testified that the described conditions were the most likely source of the disease process which debilitated petitioner. As physicians it was necessary for them to be familiar with problems of sanitation which would include the problems of disease process bred by dead, putrid animal matter of the type herein described, with insects seen crawling and flying in and about this matter.

ARGUMENT.

SUMMARY.

This appeal seeks to correct fundamental errors in the very nature and method of the judicial review indulged in by the Court of Appeals in an action under the Federal Employers' Liability Act, which fundamental errors the Supreme Court of Ohio refused to review, thereby reducing the judgment of the Court of Appeals to a final judgment.

Respondent had sought review from the Court of Appeals of Cuyahoga County upon the judgment in favor of petitioner entered by the trial court and had alleged for the consideration of the Court of Appeals sixteen grounds of error. (R. 620-622.) Most of these grounds concern themselves with procedural questions, particularly evidentiary questions, instructions of law, the findings of the jury on the special verdict, the amount of damages assessed by the jury, and other issues of trial procedure. All of these alleged grounds of error were carefully considered by the Court of Appeals and as stated in the language of the Court of Appeals, "All other claimed errors have been examined, and we find none prejudicial to the rights of the appellant." (R. 628, R. 630.) The Court of Appeals carefully limited its judgment of reversal to the narrow ground of an insufficiency of evidence from the proofs on the issue of causal connection. In its opinion, the Court of Appeals delineated the issue thusly:

> "As we view the record before us, we have a chain of possibilities that *the negligence* of the defendant *might have shared in subjecting the plaintiff to damage and injury*, but the proof of a legal causal connection between the negligence and the damage falls short of that required for the consideration of a jury." (R. 628) (Emphasis added.)

Respondent was apparently in grave doubt as to the propriety of the judgment in its favor rendered by the Court of Appeals for it prosecuted its own claims of error on a cross-motion to certify to the Supreme Court of Ohio. These claims (R. 636) again raised questions concerning the trial procedure and the amount of damages. Because two reviewing courts in the State of Ohio have refused to consider these claims of respondent it would now appear that the only remaining issue for review is the fundamental substantive question of "causal connection."

THE TEST OF A JURY CASE.

Questions 2, 3, 6, 8.

One of the early fundamental cases in which this Court held that trial by jury is part and parcel of the remedy afforded railroad workers under the Federal Employers' Liability Act was *Bailey v. Central Vermont Railway Co.*, 319 U. S. 350, 63 S. Ct. 1062 (1943). The *Bailey* case certainly did not prohibit Appellate Court supervision or jurisdiction over a jury verdict, but it did make it plain that action by Trial Courts or Appellate Courts in removing the case from the consideration of the jury by way of a directed verdict in "close or doubtful cases" did violence to the constitutional right under the Federal Constitution of an injured railroad employee to trial by jury. Yet in the instant case the Court of Appeals held the trial judge committed prejudicial error to the rights of respondent in not directing the case, thereupon raising the issue squarely as to whether the record was so devoid of evidence in support of the principal contentions of petitioner as to remove it from the "doubtful or close" category referred to in the *Bailey* case.

While perhaps the standard of a "doubtful or close case" as pronounced in the *Bailey* case might be considered

somewhat nebulous in determining the test of a jury case under Section 51 of the Federal Employers' Liability Act, it would certainly seem that after the pronouncement of this Court in *Rogers v. Missouri Pacific Railroad Company*, 352 U. S. 500, 77 S. Ct. 443 (1957), a clear standard of what constitutes a jury case was prescribed. In the *Rogers* case this Court made the now oft-quoted pronouncement:

> "Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." (352 U. S. 500, 506.)

Of course, in the *Rogers* case one might argue that the question is still open as to what this Court meant when the so-called "rule of reason" was pronounced. However, the *Rogers* case was decided in 1956, ten years after the earlier case of *Lavender v. Kurn*, 327 U. S. 645, 66 S. Ct. 740 (1946). in which this Court stated:

> "* * * a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference." (327 U. S. 653.)

Lavender v. Kurn, supra, was followed by *Wilkerson v. McCarthy*, 336 U. S. 53, 69 S. Ct. 413 (1949):

> "* * * whether there is sufficient evidence to submit an issue to the jury we need look only to the evidence and reasonable inferences which tend to support the case of a litigant against whom a peremptory instruction has been given."
>
> *Wilkerson v. McCarthy*, 336 U. S. 53, 69 S. Ct. 413 (1949), especially page 57.

The jury with reason could conclude that there was no other logical place for the bug to come from except the

pool of stagnant water with the dead rats, pigeons and vermin. This was the only vicinity where such bugs or insects were described by Petitioner as having been seen. It was only a track width from the place where petitioner was standing at the time he was bitten. *But, even if the bug could have come not only from the stagnant pool but from other sources as well, for which the respondent would not be liable, the jury under the foregoing authorities clearly had the right to make the inference that it did in fact come from the pool:*

> "It does not matter that, from the evidence, the jury may also with reason, *on grounds of probability,* attribute the result to other causes, including the employee's contributory negligence."
>
> *Rogers v. Missouri Pacific R. Co.*, 352 U. S. 500, 506 (Emphasis added); cf. *U. S. v. Diebold, Inc.*, 369 U. S. 654 (1962), summary judgment will not lie where conflicting inferences may be drawn from the underlying facts.

The jury having made such inference, it was prejudicial error for the reviewing courts to substitute the inference of the jury for another inference favorable to that of respondent.

CAUSATION UNDER THE FEDERAL EMPLOYERS' LIABILITY ACT.

Questions 1, 4, 5; 7.

The Court of Appeals determined the test of causation for the within action to be as follows:

> "The question of causation should not get to the jury, and the judge should direct a verdict for the defendant, unless the court is of the opinion that a jury can reasonably find that the defendant's tort was an *efficient cause* of the damage to the plaintiff *and*

not a mere antecedent fact." (Emphasis added.) (R. 628.)

We will, of course, agree that if the employer negligence is a mere antecedent fact, petitioner has failed to prove a necessary element in his case; namely, that there be proof of some causal relationship, however slight, between the employer negligence and the injury of the workman. It does not necessarily follow, however, that this degree of causal connection rise to the level of being an "efficient" cause in order to be a basis for recovery. The words "efficient cause" are defined in the dictionary as meaning:

> "Efficient Cause" "the immediate agent in the production of an effect" *Webster's Third New International Dictionary* (1961).

It is quite clear, therefore, that although on the one hand the Court of Appeals in its Opinion recognized that common law proximate causation is not required in this action, nevertheless the Court fell into the error of applying this test under another label. There is little to distinguish an "efficient cause" from a "proximate cause." A cause to be proximate must be efficient.

The fallaciousness of the test applied by the Court of Appeals to hold that petitioner fell short of proving a case of legal causation may be demonstrated by analysis of many of the recent cases decided by this Court involving this identical issue. A classic illustration that "some" causation as distinguished from "efficient" causation will suffice to sustain the action may be found from the recently decided case of *Davis v. Virginia Railway Co.*, 361 U. S. 354, 80 S. Ct. 387 (1960).

The majority of this Court disagreed with the resolution of this issue by the State Court and held as follows from page 356 of 361 U. S.:

"We think it should have been left to the jury to decide whether respondent's direction to complete the spotting operation within 30 minutes, plus the experience of the brakemen assigned to perform this 'hot job' *might have* precipitated petitioner's injury. The debatable quality of that issue, the fact that fair-minded men *might reach* different conclusion, emphasize the appropriateness of leaving the question to the jury. The jury is the tribunal under our legal system to decide that type of issue * * * as well as issues involving uncontroverted evidence * * * to withdraw such a question from the jury is to usurp its function." (Emphasis added.)

Another good illustration on the degree of causation necessary to sustain the case is *Gibson v. Thompson*, 355 U. S. 18, 78 S. Ct. 2 (1957), involving injuries to an engineer. In the newly constructed yard in which the engineer worked, no walkway had been provided for the 900 foot walk from the roundhouse to yard C. Instead, it was necessary to walk across yards A and B, detouring around equipment and switching movements and progress in those yards. The gravel in the yards was loose and unpacked. It shifted beneath the engineer as he was walking through the yards and he fell and was injured. A jury found that the Missouri Pacific Railroad Company had failed to provide a reasonably safe place in which to work, and the Texas Court of Civil Appeals agreed, but the Texas Supreme Court reversed and ordered judgment for the railroad. That Court said that even though it was bound by Federal Decisions as to what constitutes negligence, *as to sufficiency of the evidence* it had the right to appraise the evidence in accordance with the concept of negligence as announced in prior cases. See 298 S. W. 2d 97, (1957). By this standard, the Texas Supreme Court found no negligence since the railroad had constructed the yard in accordance with specifications of the "best

qualified construction engineers in America" and since, though other employees had had similiar falls, *no one had ever complained to the railroad about the gravel.* However, again this Court reversed with its oft-repeated general admonition:

> "We hold that the proof justified with reason the jury's conclusion that employer negligence played a part in producing the petitioner's injury."

Even more dispositive of the current law on the issue of legal causation is *Stinson v. Atlantic Coastline Railroad*, 355 U. S. 62, 78 S. Ct. 136 (1957). The facts as revealed in the State Court decision reported in 96 So. 2d 305 (1957), were that Stinson left his engine, which was on a wrecking job, and went to get something to eat. He was never seen again. His severed body was found across the track three-quarters of a mile from where he had last been seen. The body was nude and his clothes were wadded between the tracks 150 yards away. In Stinson's absence, the fireman had made several movements of the train, in violation of company rules, and had not sounded the bell before doing so, as the company rules required. *The Alabama Supreme Court held that the jury could find negligence from this breach of the company rules, but under the circumstances, in which Stinson's body was found, it held there was no evidence as to what had proximately caused his death, or that it was in the course of his employment.* It thereupon ordered what would be the equivalent of an Ohio directed verdict for the defendant. Again, this Court reversed the Alabama Supreme Court, stating merely that the evidence presented a jury question as to whether Stinson's death resulted in whole or in part from the negligence of the railroad.

Of similar import is *Sentilles v. Inter-Caribbean Shipping Corporation*, 361 U. S. 107, 80 S. Ct. 173 (1959),

reversing 256 F. 2d 156. In the *Sentilles* case, the seaman brought an action for damages under the Jones Act, 46 U. S. C. A. Sec. 688, claiming damages by reason of being pitched into the air and falling back to the deck of the ship thereupon allegedly activating or aggravating a previous latent tubercular condition. Judgment had been rendered for the seaman in the District Court which was reversed by the Circuit Court of Appeals because the medical testimony as to causal connection between the traumatic incident and the tubercular condition was in the opinion of the Court "speculative and based upon conjecture." Once again, this Court rejected the label of "speculation and conjecture" as a ground for taking away a jury verdict, but held instead, page 109 of 361 U. S.:

> "The jury's power to draw the inference that the aggravation of petitioner's tubercular condition, *evidenced so shortly after the accident*, was in fact caused by the accident, was not impaired by the failure of any medical witness to testify that it was in fact the cause. Neither can it be impaired by the lack of medical unanimity as to the respective likelihood of the potential causes of the aggravation, or *by the fact that other potential causes of the aggravation existed and were not conclusively negated by the proof.*" (Emphasis added.)

To the same effect, see *Michalic v. Cleveland Tankers, Inc.*, 364 U. S. 325, 81 S. Ct. 6 (1960), reversing 271 F. 2d 194 (6 C. C. A.). In the *Michalic* case, the claim was that a wrench dropped on the petitioner's foot aggravating an existing Buerger's disease. As noted from the opinion, Michalic contended that the proofs were sufficient to justify the jury in finding with reason that there was play in the jaw of the wrench he was using which prevented a tight grip on the nut, thereby entitling the jury to find that respondent, the shipping company, furnished him with a de-

fective wrench. The trial judge found the evidence to be insufficient to present a jury question whether the wrench was a reasonably suitable appliance, *because on the theory that the grip was worn there was never any mention of the grip in the case. The Circuit Court of Appeals took the same view saying there was no evidence that the open or jaw end of the wrench was in any way deficient. The fact that the wrench slipped is not evidence that its slipping was the consequence of some condition in the jaw or handle in the wrench.* The Opinion of the Sixth Circuit Court of Appeals may be found in 271 F. 2d 199. However, this Court stated as follows:

> "We think that both lower Courts erred. True, there was no direct evidence of play in the jaw of the wrench, as in *Jacob v. New York City*, 315 U. S. 752, 754. But direct evidence of a fact is not required. *Circumstantial evidence is not only sufficient but may also be more certain, satisfying and persuasive than direct evidence.*" (Emphasis added.)

There is nothing unusual about the foregoing pronouncement and it can, of course, be said with certainty that both the trial court and the Sixth Circuit Court of Appeals recognized that it is not necessary to have any direct evidence to prove an essential fact in issue. A sufficient degree of circumstantial evidence has always been recognized even in common law as proof of a fact in issue. *The real question is in evaluation of the circumstantial evidence to determine whether in fact the evidence as thus adduced is sufficient to entitle the jury to make the inference of the essential facts or whether it falls below the standard of proof and must be relegated to the role of speculation and conjecture.* It seems that once again the mandate is clear that the decision as to whether the evidence is sufficient to permit an inference of an essential fact, or falls below the standard of proof required,

and is mere speculation and conjecture is not, in an F. E. L. A. case, or a Jones Act case, a decision which the Appellate Court may make but is part of the right of the employee to have the jury weigh the evidence. Once there is some evidence of a fact, the question as to whether that evidence is sufficient to entitle the jury to make an inference of a further fact essential to support the cause of action is, under the Federal Employers' Liability Act, a function strictly for the jury. The jury cannot be deprived of its right to exercise that function by a reviewing court classifying the circumstances as being within the realm of mere speculation and conjecture.

Other cases which might be cited in support of the proposition that an efficient producing cause is not the test to be applied in a Federal Employers' Liability Act case as the standard of legal causation, are *Lavender v. Kurn*, 327 U. S. 645, 66 S. Ct. 740 (1946); *McBride v. Toledo-Terminal Railroad Co.*, 354 U. S. 517, 77 S. Ct. 1398 (1957); *Rogers v. Missouri Pacific Railroad Co.*, 352 U. S. 500, 77 S. Ct. 443 (1957); *Schulz v. Pennsylvania Railroad Co.*, 350 U. S. 523, 76 S. Ct. 608 (1956); *Harris v. Pennsylvania Ry. Co.*, 361 U. S. 15, 80 S. Ct. 22 (1959).

THE DECISION OF THE COURT OF APPEALS OF OHIO.

Question 9.

A. The Court of Appeals imposed an improper burden upon Petitioner.

This Court has, of course, on frequent occasions held that in the absence of proof of negligence a verdict for petitioner cannot stand. See *Inman v. B & O Railroad Co.*, 361 U. S. 227, 80 S. Ct. 242 (1959); *New York, New Haven and Hartford Railroad Co., v. Hanagan*, 364 U. S. 441, 81 S. Ct. 198 (1960). However, it is equally clear from the authorities already cited that where the proofs justify a

finding of negligence, a verdict for petitioner should not be reversed under the standards of judicial review pronounced by this Court on a theory that the causal connection between such negligence and injury is based upon speculation and conjecture, particularly when there is an evidentiary basis in the record for a finding of causal connection.

It should be noted, however, at the outset, that in both the *Inman* and the *Hanagan* cases this Court found no evidence of *negligence*, and that the injuries were in fact brought about by the intervention of a third party over whom there was no showing that the railroad had any right of direction and control. Neither the *Inman* nor the *Hanagan* cases were concerned with the sufficiency of proof of *causal connection* once the *negligence* of the employing railroad was established to the satisfaction of the Court. *In the instant case, as noted from Opinion of the Court of Appeals, the necessary element of negligence was established from the record to the satisfaction of that Court. Thus, the Court of Appeals stated:*

> "We can, with reason, say that, to maintain for a period of years a stagnant, vermin-infested pool of water on and over which insects gather, on property where employees are required to work, could furnish the gravamen of an offense under the Federal Employers' Liability Act." (R. 626.)

In this connection, it is worthy to note that unlike the *Inman* and *Hanagan* cases no third party is here involved. The negligence was the improper maintenance of its own property by the respondent, and a static condition of many years existence of which, according to the proofs, the respondent had adequate knowledge. It cannot be argued with any degree of fairness that the insect in the instant case, which was merely a transmittal agency, can be

likened to the "drunken driver" in the *Inman* case, or the "suicide" in the *Hanagan* case.

At this point it is well to digress and analyze further the Opinion of the Court of Appeals in which that Court fell into the error of concluding that the evidence in support of the inference that the poisonous insect came from the stagnant pool of water fell short of the required degree of proof *because the petitioner had failed to adduce evidence to exclude the fact that it may have come from the nearby putrid mouth of the Cuyahoga River, or from weeds, or unsanitary places situated on property not owned or controlled by the railroad.* (R. 628). It was for this reason that the Court of Appeals determined that the evidence that it came from the pool of putrid water under the Columbus Road Bridge required guesswork, speculation, or conjecture on the part of the jury. *We feel that any fair reading of the Opinion of the Court of Appeals makes it obvious that what that Court is saying is that there was evidence, as already alluded to in this brief, from which it might have been inferred that the insect became infected from the pool of water and thereupon crawled up petitioner's pants leg and bit him, setting in motion the chain of events which led to his present condition. But there was likewise evidence that the insect may have come from contaminating sources over which the respondent had absolutely no right of control and produced the same result; that to determine from which source this particular insect came would involve pure speculation and conjecture on the part of the jury.* This is but another way of saying that where there are two causes, each of which are capable of producing the harm complained of, but for only one of which the defendant would be liable, it devolves upon the petitioner, having the burden of proof, to eliminate the non-liability cause. Thus the Court of Appeals

imposed upon petitioner the burden of proving common law proximate causation. See *Gedra v. Dallmer Co.*, 153 Oh. St. 258, 91 N. E. 2d 256 (1950), especially syl. 3.

However, as already noted from the many citations herein set forth, particularly *Lavender v. Kurn, supra; Rogers v. Missouri Pacific Railroad Co., supra; Schulz v. Pennsy. Ry. Co., supra; Harris v. Pennsylvania Railroad Co., supra;* and *Michalic v. Cleveland Tankers, Inc., supra; the power of the jury to make the inference that the insect came from the liability source, rather than one of the non-liability sources mentioned, is peculiarly a jury function under the law of causation as applied to Federal Employers' Liability Act cases.* It was the failure to recognize this role of the jury which forms the fundamental basis of the error of the Court of Appeals as is demonstrated by their use and reliance upon the language of "efficient causation" in the Opinion of that Court. The Court of Appeals thus reversed a judgment in favor of petitioner and entered final judgment for respondent on the false premise that petitioner must not only adduce proof of causation but eliminate non-liability causes as well. This common law doctrine which is part of the law of "proximate causation" has repeatedly been repudiated by this Court in Federal Employer Liability Act cases. The principles of legal causation in an action under the Federal Employers' Liability Act, as distinguished from the common law requirement of proximate causation in a common law negligence action, were ably summarized by Evans, Circuit Judge, in *Eglsaer v. Scandrett*, 151 F. 2d 562 (1945), with a quote from *Roberts, Federal Liabilities of Carriers*, Sec. 869.

In this connection, we believe that the principles of law enunciated by this Court in the leading case of *Tennant, Admx. v. Peoria & P. U. Railway Co.*, 321 U. S. 29,

64 S. Ct. 409 (1944), have peculiar application to the issues raised by the instant appeal.

In the *Tennant* case it will be recalled a switchman was killed under circumstances which the Courts below (134 F. 2d 860) held insufficient to establish evidence of causal connection. There were disputing inferences which could reasonably be drawn from the evidence, all as more fully pointed out by this Court on page 33 of its Opinion, 321 U. S. On page 34 of 321 U. S., the Opinion of the Court, the following is contained:

> "In holding that there was no evidence upon which to base the jury's inference as to causation, the Court below emphasized other inferences which are suggested by the conflicting evidence. Thus it was said to be unreasonable to assume that Tennant was standing on the track north of the engine in the performance of his duties. It seemed more probable to the Court that he seated himself on the footboard of the engine and fell asleep. Or he may have walked back unnoticed to a point south of the engine and been killed while trying to climb through the cars to the other side of the track. These and other possibilities suggested by diligent counsel for respondent all suffer from the same lack of *direct* proof as characterizes the one adopted by the jury. But to the extent that they involve a disobedience of duty by Tennant no assumption of risk or contributory negligence on Tennant's part be presumed in order to negate an inference that death was due to respondent's negligence." (Emphasis ours.)

321 U. S. 35, of the Opinion of the Court:

> "It is not the function of a Court to search the record for conflicting *circumstantial* evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. *The focal point of judicial review is the reasonableness of the particular inference or con-*

> *clusion drawn by the jury.* It is the jury, not the Court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. *The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable.* * * * That conclusion, whether it relates to negligence, *causation* or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury *could* have drawn different inferences or conclusions or because Judges feel that other results are more reasonable." (Emphasis ours.)

It is clear from the caveat of the *Tennant* case that the Court of Appeals fell into the very error admonished against by this Court. Specifically, in removing from the jury its function to select from among conflicting inferences and conclusions that which the jury considered most reasonable, even though there were proofs in the record for the jury to select the very inference which it did; namely, that the bite to petitioner which caused his condition of ill-being was directly connected to the unsanitary conditions maintained by respondent in said pool of stagnant water.

B. The Court of Appeals substituted its judgment for that of the jury in weighing the evidence.

The following from the headnotes of *Lavender v. Kurn, supra,* would appear dispositive of this question:

> "3. In suits under the Federal Employers' Liability Act, the Appellate Court's function *is exhausted* when the evidentiary basis for the jury's basis becomes apparent, it being immaterial that the Court might draw a contrary inference or consider another con-

clusion more reasonable. Page 653." (Emphasis ours.)

"4. Only when there is a *complete absence* of probative fact to support the conclusion reached by the jury does reversible error appear. Page 653." (Emphasis ours.)

"6. In actions under the Federal Employers' Liability Act, rulings on the admissibility of evidence must normally be left to the sound discretion of the trial judge. Page 653."

The foregoing was further clarified by *Rogers v. Missouri Pacific Railroad Co., supra,* especially the following headnote:

"5. In actions under the Act, Congress has vested the power of decision *exclusively* in the jury in all but the infrequent cases where fair-minded jurors cannot honestly differ whether fault of the employer plays *any part* in the employee's injury. Pages 504-505, 509-510." (Emphasis added.)

It would certainly appear from the foregoing that if there is any evidence at all in the instant Record to support a finding by the jury that employer negligence played some part in producing plaintiff's injuries, then the Trial Court was duty bound to submit the issue to the jury and the Court of Appeals erred prejudicially in holding to the contrary.

This proposition would seem to be abundantly clear from the case of *Gulf, Colorado & Santa Fe Railway Co. v. Deen,* 353 U. S. 925, 77 S. Ct. 678 (1957) and 358 U. S. 57, 79 S. Ct. 1 (1958). The *Deen* case was tried in the State Court of Texas. The facts revealed that plaintiff broke his leg trying to dump babbitt from a defective melting pot. He undertook the task alone without any specific suggestion or requirement by his foreman who did not know that Deen was doing this particular job at that time. A co-em-

ployee named Snow observed plaintiff struggling with the babbitt kettle and voluntarily assisted him. The evidence clearly establ. .ed that the safe way to dump the babbitt was to dump the pot away from the men. However, because of the weight of the pot containing the babbitt the two men were unable to control the pot in this manner and therefore attempted to dump the babbitt by turning the pot toward them. There were other men generally available about the area whom plaintiff could have requested to assist him and with their assistance the pot could easily have been dumped the safe way; that is, away from the men. On prior occasions by getting sufficient help plaintiff had safely performed the task by dumping the pot away from him. On this occasion, when plaintiff and Snow were dumping the pot toward them, the babbitt fell out, striking plaintiff in the leg causing his injuries.

Plaintiff's claim of negligence was insufficient help or in the alternative, insufficient tools. The case was submitted to the jury on a special verdict under Texas Procedure. *The jury rejected plaintiff's contention of insufficient help or insufficient supervision but did find defendant negligent on the sole ground of failure to furnish plaintiff with proper tools to remove the babbitt. There was no evidence that the additional tools suggested by plaintiff or Snow were in use, safe, or approved.*

Error was prosecuted to the Court of Appeals under the so-called "no evidence point of error" under the Texas Civil Procedure. A "no evidence point of error" under Texas Procedure simply means that the Court of Appeals determines whether there is *any* evidence to support a finding of negligence and if it finds *none* from the record, it affirms this ground of error by entering final judgment for the defendant. The Court of Appeals thereupon affirmed the "no evidence point of error" urged by defendant

the report of which may be found in 275 S. W. 2d 529 (1955). The Texas Court of Appeal held that the employer was obliged under the Federal Employers' Liability Act to adopt only one reasonably safe way in which to perform the task. Specifically, it held that since the task could be safely performed by sufficient help and sufficient help was available for this purpose, the employer owed no duty to provide any special tools. (This is the equivalent of what was done by the Court of Appeals in the instant case in holding that the trial court prejudicially erred in not directing a verdict because there was no evidence to support plaintiff's cause of action on causal connection.)

The Texas Supreme Court refused to review the case, that is, dismissed the application for writ of error, whereupon appeal was perfected on a petition for a writ of certiorari to the Supreme Court of the United States which reversed the Texas Court of Appeals, the judgment of reversal being reported in 353 U. S. 925, 77 S. Ct. 678 (1957), and remanded the case to the Court of Appeals for further proceedings. At this point, the defendant urged the Court of Appeals to consider its second point of error, what is known as "the insufficient evidence point of error" under Texas Procedure. Under the insufficient evidence point of error proceeding, if the Court of Appeals finds this point to be well taken, it cannot enter final judgment for the defendant, but must remand the cause for a new trial. The Court of Appeals, however, considered itself foreclosed from considering this point in view of the decision of the United States Supreme Court in holding that the proofs justified the jury finding with reason that employer negligence played some part in producing the petitioner's injury. This time, however, the Supreme Court of Texas disagreed and granted a writ of error for the purpose of remanding the cause for a new trial on the

insufficiency of evidence point of error urged by the defendant railroad. This Opinion may be found in 306 S. W. 2d 171 (1957). However, on appeal again to the United States Supreme Court, this Court held that its earlier decision did indeed foreclose the question of insufficiency of evidence and that the Texas Supreme Court had no authority to remand the case for a new trial. See 358 U. S. 57, 79 S. Ct. 1 (1958).

An explanation of the Texas Procedure on the so-called "no evidence" and "insufficient evidence" points of error may be found in a Law Review article, "No Evidence and Insufficient Evidence Points of Error," 38 *Texas L. R.* 361 (1960), by Robert W. Calvert, Associate Justice of the Supreme Court of Texas. Any fair reading of the *Deen* case in the light of its history establishes that the United States Supreme Court intends the jury to have the sole power of decision in factual questions of negligence and causal connection and the Appellate Courts are not permitted under this Act to weigh the evidence to determine its sufficiency or total lack thereof, if there is any evidence at all to support the jury finding.

Prior to the *Deen* case, this Court decided the case of *Harsh v. Illinois Terminal Railroad Company*, 348 U. S. 940, 75 S. Ct. 361 (1955), which reversed a decision by the Illinois Appellate Court as reported in 351 Ill. App. 272, 114 N. E. 2d 901 (1953). Although the *Harsh* case was based upon the Boiler Inspection Act, 45 USCA Sec. 23, the question of the sufficiency of the evidence to prove the necessary elements of a cause of action under that Act would be the same as under the Federal Employers' Liability Act, Section 51.

The Appellate Court of Illinois found that plaintiff's evidence taken as true had sufficient probative force to require the issues to be submitted to a jury. But the resolu-

tion of those issues by the jury as to violation of the Boiler Inspection Act were held to be contrary to the manifest weight of the evidence, thereby causing that Court in reviewing the sufficiency of the evidence to reverse and remand the cause for a new trial. The Supreme Court of the United States, in reversing the Appellate Court of Illinois, held in effect that the evidentiary basis to support the jury verdict having been established from the record, the Appellate Court did not have the authority under the Act to determine that such findings were against the manifest weight of the evidence. As already noted the *Harsh* case was decided by the United States Supreme Court in 1955 and the *Deen* case was decided in 1957. Clearly the *Harsh* and *Deen* cases when read together establish the basic principle with regard to Appellate review in these classes of cases that where some evidence can be found in the record to support a finding by the jury, it is prejudicial to the rights of the employee for the Appellate Court to remove the case from the consideration of the jury.

Following the decisions of this Court in the *Harsh* and *Deen* cases the question of Appellate review of the evidentiary basis of a jury verdict in a case brought under the Federal Employers' Liability Act again came before the Illinois Courts, this time to the Supreme Court of Illinois in the case of *Bowman v. Illinois Central Railroad Co.*, 11 Ill. 2d 186, 142 N. E. 2d 104 (1957). Commencing on page 114 of 142 N. E. 2d, Justice Bristow sets forth an exhaustive discussion on the issue of Appellate review of jury verdicts, including his analysis of the *Harsh* case. On this phase of the appeal in the *Bowman* case, *Justice Bristow concluded that there being an evidentiary basis for the verdict of the jury, the Appellate Court was obliged to affirm and did not have the authority to consider the weight of the evidence.* A petition for a writ of certiorari

in the *Bowman* case was denied by the United States Supreme Court. See 355 U. S. 837, 78 S. Ct. 58 (1957).

We certainly want to make it clear in this brief that we are not advocating that the Appellate Courts have no role in Federal Employers' Liability Act cases other than to rubber stamp a jury verdict, or a finding of fact by the jury. The United States Supreme Court has recognized, and we recognize, that where there is *no* evidence to support a necessary element in the plaintiff's case, even though brought under the Federal Employers' Liability Act, that it then becomes the duty of the Court to enter final judgment for the railroad. However, we do contend that when there is such evidence, the Appellate Court does not have the authority to make a finding of fact contrary to that of the jury by labeling such evidence "mere speculation and conjecture." Such a label of necessity means that the Court is weighing the evidence.

About the clearest illustration possible on the functions of Appellate review on the question of the sufficiency of the evidence to sustain the claim is the case of *Gibson v. Elgin, Joliet and Eastern Railway Co.*, 246 F. 2d 834 (1957). The facts as contained in the Opinion reveal that plaintiff was employed by the defendant railroad as a timekeeper. He and a co-employee named George Marjanian worked in a building, the interior of which had a bare wooden floor. There were cinders about the exterior of the building. At the time of the accident there was no doormat at the entrance. Plaintiff worked at a desk around which, from time to time, applicants for employment and employees came on business and brought with them dirt, cinders, pebbles and grease, making the floor dirty and slippery. On the evening of December 12, 1951, plaintiff and Marjanian were working overtime to get out a payroll. Marjanian asked plaintiff to put an adding machine,

which Marjanian had borrowed, under plaintiff's desk to avoid it being damaged by truck drivers in the morning. Plaintiff had done this on other occasions. Plaintiff in putting the adding machine under the desk, struck his head against the edge of the desk. Plaintiff testified:

> "It must have been as I was backing out, because I had a terrific bump on my head, and I must have slipped."

Plaintiff further testified (246 F. 2d):

> "I lost my balance somehow and bumped my head on the edge of the drawer as I was getting out from under the desk. As I was getting out, I say I don't know whether I lost my balance or not." (p. 835.)

Marjanian testified that in a conversation with plaintiff, plaintiff (246 F. 2d):

> "started to tell me that he slipped under his desk and hit his head under his desk; he told me he slipped on some cinders or pebbles; I couldn't tell you exactly what he said at that time." (p. 835.)

The Trial Judge granted a judgment notwithstanding the verdict after a favorable jury verdict for plaintiff. In so doing, the Trial Court stated (246 F. 2d):

> "While the evidence, as showed by this testimony, is that the floor of Building 100 was dirty on the evening in question and that frequently there were quantities of cinders, pebbles, grease and tar on the floor, there is no direct competent evidence that there was any such foreign substance under or in front of the desk, where the plaintiff says he received his injury. At best it can only be inferred." (pp. 835, 836.)

The Trial Judge pointed out that plaintiff testified that: "he must have slipped." The Trial Court further stated in support of the judgment notwithstanding the verdict (246 F. 2d):

> "To find that the plaintiff injured his head by slipping because of a foreign substance on the floor, we must infer, first, that there was such a substance at the place where plaintiff was bending under the desk and, second, that he actually slipped because of such condition. Thus, the finding, essential for the support of the verdict, is based upon one inference which rests in turn upon another inference." (p. 836.)

What is the difference between granting a judgment n.o.v. because "there is no direct competent evidence that there was any such foreign substance * * * where plaintiff says he received his injury," and granting a final judgment on appeal because "whether the insect causing the damage had any connection with the pool of stagnant water on defendant's premises, or whether it came from * * * property not owned or controlled by the railroad, presents only a series of guesses and speculations, * * *"?

In *Gibson, supra,* the Circuit Court of Appeals vacated the order of the trial court granting judgment n.o.v., and ordered that judgment be entered on the verdict of the jury. This Court refused certiorari, 355 U. S. 897, 78 S. Ct. 271 (1957).

Thus, in the *Gibson* case we have the Circuit Court of Appeals recognizing some element of speculation and conjecture on the part of the jury in finding a causal connection, but nevertheless reinstating a jury verdict for the plaintiff after the trial court had set aside said verdict on a judgment, n. o. v. We have the Supreme Court of Ohio taking the position in both *McBride v. Toledo Terminal Ry. Co.*, 166 Oh. St. 129, 140 N. E. 2d 319 (1957), reversed by 354 U. S. 517, 77 S. Ct. 1398 (1957); and *Harris v. Pennsy. Ry. Co.*, 168 Oh. St. 582, 156 N. E. 2d 822 (1959), reversed by 361 U. S. 15, 80 S. Ct. 22 (1959); that because a measure of speculation and conjecture would

be necessary on the part of the jury to find a sufficiency of evidence to support the cause of actions asserted that the verdicts should not be permitted to stand whereupon final judgment was entered by the Supreme Court of Ohio for the appealing railroad. For example in *McBride*, *supra*, the Supreme Court of Ohio foisted upon the plaintiff below the burden of excluding inferences favorable to the defendant railroad below with the following language (166 Oh. St.):

> "* * * Plaintiff has not only failed to establish a causal connection between the failure of the defendant to provide adequate lighting, *he has also failed to exclude the more reasonable inference that his injury was due to the slipping of his shoe from the rung of the ladder.*" (pp. 131, 132.) (Emphasis added.)

In *Harris*, *supra*, this same Supreme Court of Ohio found evidence to support the finding of the jury wanting in the following language (168 Oh. St.):

> "The existence of oil on the crosstie *is at best problematical*, and, *if* there was oil present, there was no showing that defendant placed it there, knew about it, or, in the exercise of ordinary care, should have known about it." (p. 587) (Emphasis added.)

In both *McBride* and *Harris*, this Court granted certiorari and reversed the above holdings of the Ohio Supreme Court. Nevertheless the Court of Appeals in the instant case, in effect, refused to follow the reasoning of *Gibson* (which is directly in point on the issue of causal connection), but chose to follow instead the reasoning of the Ohio Supreme Court in *McBride* and *Harris*, which reasoning had already been rejected by this Court.

CONCLUSION.

We feel that we have demonstrated from the controlling authorities that there is a sufficiency of proof on the record for the jury to make the inference which it did that petitioner was bitten by an insect which came from a disease-producing filthy pool of staghant water, improperly maintained by the respondent on its premises under its control, in which for years it permitted dead pigeons and dead rats to accumulate and rot. There was evidence for the jury to conclude that these unsanitary conditions were the producing cause of petitioner's condition of ill-being. By labeling the proof adduced in support of petitioner's claim of a causal connection as "speculation and conjecture," the Court of Appeals did violence to the mandate of this Court that the function of weighing the evidence to determine whether it meets the standard of an inference is purely a function of the jury in this class of case. To remove the cause from the consideration of the jury by reason of a failure of the petitioner to eliminate other sources for which the respondent might not be liable as an efficient-producing cause of the injury was in fact a usurpation of petitioner's rights under the Federal Constitution as an employee in Interstate Commerce to a trial by jury. The determination as to the right to trial by jury has been construed by this Court and required by it to have uniform application throughout the United States. *The Court of Appeals itself having found evidence in the record to support a finding of causal connection between the negligence complained of and the resulting injury had under the law exhausted its function, Lavender v. Kurn, supra.* Its duty then became that of affirming the judgment entered by the trial court *inasmuch as in every other respect the Court of Appeals found no error prejudicial to the appellant railroad.*

RELIEF PRAYED FOR.

By reason of the foregoing, petitioner respectfully prays that this Court reinstate the judgment of the Court of Common Pleas of Cuyahoga County, Ohio, in favor of petitioner entered upon the special verdict of the jury, reduced to judgment in favor of petitioner in the sum of Six Hundred Twenty-Five Thousand Dollars ($625,000.00), with interest accrued according to law; and that a mandate issue by the Supreme Court of the United States to the Court of Appeals for Cuyahoga County accordingly to reinstate the judgment for petitioner.

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APPENDIX A.

Title 45, U. S. C., Section 51.

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories, and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149, § 1, 35 Stat. 65; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404.

APPENDIX B.

Title 45, U. S. C., Section 53.

Contributory negligence; diminution of damages.

In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided*, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee. Apr. 22, 1908, c. 149, § 3, 35 Stat. 66.

APPENDIX C.

Title 45, U. S. C., Section 54.

Assumption of risks of employment.

In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where

the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee. Apr. 22, 1908, c. 149, § 4, 35 Stat. 66; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404.

APPENDIX D.

Title 45, U. S. C., Section 56.

No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.

Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States. Apr. 22, 1908, c. 149, § 6, 35 Stat. 66; Apr. 5, 1910, c. 143, § 1, 36 Stat. 291; Mar. 3, 1911, c. 231, § 291, 36 Stat. 1167; Aug. 11, 1939, c. 685, § 2, 53 Stat. 1404; June 25, 1948, c. 646, § 18, 62 Stat. 989.

APPENDIX E.

Ohio Revised Code, Section 2315.15.

If requested by either party before the giving of any special charge and before argument to the jury, the court shall submit in writing each determinative issue to be tried by the jury and direct the jury to render a special verdict in writing.

APPENDIX F.

Ohio Revised Code, Section 2315.16.

When either party requests it, the court shall instruct the jurors, if they render a general or special verdict, specially to find upon particular material allegations contained in the pleadings controverted by an adverse party, and submitted by the court in writing, to the jury, and shall direct the jury to return a written finding thereon. The verdict and finding must be entered on the journal and filed with the clerk.

APPENDIX G.

Ohio Revised Code, Section 2315.17.

When a special finding under Section 2315.16 of the Revised Code is inconsistent with the verdict, the former shall control the latter, and the court may give judgment accordingly.